of him for the past nine years, I had considered that a change in custody would be too traumatic for the infant.

Bearing all considerations, particularly the infant's wish that he would like to remain with his mother and that both the respondent and her husband are willing to pay for the infant's expenses to come to Malaysia to see the applicant at least once a year, I had considered that in the best interest of the infant, custody should continue to remain with the respondent and to that end, I had dismissed the applicant's application with cost. However, to ensure that the relationship of father and son is not forgotten altogether, I had also directed that the respondent, on her own expenses, sends the infant to Malaysia at least once a year to enable him to see the applicant and pending his departure to Budapest, the respondent is to give every opportunity for the infant to be with the applicant. Lastly, I also had the ex parte injunction vacated.

*Order accordingly.*

Solicitors: *Adnan Sundra & Low; Mutalib & Bakarudin.*

Reported by *Prof Ahmad Ibrahim*

## Dusun Semenyih Sdn Bhd v Development & Commercial Bank Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO S6-31-2848-87
SITI NORMA YAAKOB J
8 MARCH 1988

*Land Law – Order for sale made by land administrator – Application to set aside – Whether lack of legal representation at inquiry before land administrator fatal – Whether claim by chargee for double interest fatal – National Land Code 1965, ss 262 & 263*

*Civil Procedure – Order of sale made by land administrator – Application to set aside – Application in the nature of an appeal – Whether application by way of originating summons proper – National Land Code 1965, s 418(1) & (2) – Rules of the High Court 1980, O 55 r 1*

The plaintiffs applied by way of originating summons to set aside the order of sale made by the land administrator under s 263(1) of the National Land Code 1965. The plaintiffs alleged that the absence of legal representation at the inquiry before the land administrator had prejudiced their case and that it was improper for the defendants to claim for double interest, namely, 13.25% pa on the principal loan and 18% pa on the excess.

**Held,** dismissing the application: (1) The application of the plaintiffs was in the nature of an appeal under s 418(1) of the National Land Code 1965. Having regard to s 418(2) of the Code and O 55 r 1 of the Rules of the High Court 1980, the appeal should commence by way of an originating motion accompanied by the appeal records. As the plaintiffs had failed to comply with the mandatory provision of s 418(2) of the Code, their application was dismissed on this ground alone.

(2) Even assuming that the plaintiffs' application had been properly begun, there was nevertheless no merit disclosed in the plaintiffs' affidavits that warrants the setting aside of the order of sale made by the land administrator. The absence of the plaintiffs' solicitors at the inquiry had not prejudiced the plaintiffs' case in any way. Under s 262 of the Code, the only persons entitled to be heard were the chargor or chargee who were the plaintiffs and the defendants and since both were present, the land administrator had every right to proceed with the inquiry.

(3) Under the annexure to the charge, the defendants were entitled unilaterally to vary the rate of interest from time to time without notice. In accordance with the agreement, the plaintiffs were charged a higher rate for the excess as they had exceeded the use of the approved limit of the loan facility.

(4) As the plaintiffs had failed, even on the merits, to establish that the land administrator was wrong in making the order of sale under s 263(1) of the Code, the application was dismissed.

**Legislation referred to**
National Land Code 1965 ss 262, 263(1), 418(1), (2)
Rules of the High Court 1980 O 55 r 1

*SA Ponmugam* for the plaintiffs.
*V Alahakone (Miss)* for the defendants.

*Cur Adv Vult*

**Siti Norma Yaakob J:** In this originating summons, the plaintiffs seek to set aside the order of sale made by the district land administrator, Ulu Langat, pursuant to s 263(1) of the National Land Code on 23 July 1987. From the very nature of their prayer, it is an appeal under s 418(1) of the National Land Code which provides that 'any person or body aggrieved by any decision under this Act of the state director, the registrar or any land administrator, may at any time within the period of three months, beginning with the date on which it was communicated to him, appeal therefrom to the court'.

The form and procedure this appeal should take is further governed by s 418(2) of the National Land Code which provides that 'any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure, and the court shall make such order thereon as it considers just'.

The written law now in force relating to civil procedure is the Rules of the High Court 1980, and the relevant order and rule is O 55 r 1 and that such an appeal should commence by way of an originating motion accompanied by the appeal records.

Clearly the plaintiffs had not taken heed of s 418(2) which is a mandatory provision and on their omission alone, I had dismissed this originating summons with costs.

Even assuming that this application had been properly begun, are there merits disclosed in the plaintiffs' affidavits that warrant my setting aside the district land administrator's order? For this, the plaintiffs can only possibly rely on two grounds as disclosed in their affidavits:

(1) Lack of legal representation at the inquiry before the district land administrator when he refused the application of the plaintiffs' solicitors for an adjournment. I do not consider that the absence of the plaintiffs' solicitors at the inquiry had prejudiced the plaintiffs' case in any way as under s 262 of the National Land Code, the only persons entitled to be heard are the chargor or chargee who are the plaintiffs and defendants and since both were present, the district land administrator had every right to proceed with the inquiry.

(2) The allegation that the defendants have claimed double interest, 13.25% pa on the principal loan of $1 million and 18% pa on the excess. Under cl 10 of the annexure to the charge, the defendants are entitled unilaterally to vary the rate of interest from time to time without notice. Thus when the loan facility was first granted, the interest chargeable was 15.5% pa. This was later reduced by the defendants to 13.25% pa, a fact in no way disputed by the plaintiffs. However, a different and higher rate of interest is levied if the plaintiffs use the facility above the approved limit of $1 million. This was clearly spelt out in the Form 16D notice sent by the defendants to the plaintiffs on 22 September 1986 which, as far as I can see, was never objected to until the order for sale was made. Since the plaintiffs had exceeded the use of the approved limit, they were charged a higher rate for the excess.

Since even on the merits, the plaintiffs had failed to establish that the district land administrator had been wrong in making the order for sale under s 263(1) of the National Land Code, the application to set it aside cannot possibly succeed and must be dismissed with costs.

*Order accordingly.*

Solicitors: *Ponmugam & Co*; *Yazid Baba & Partners*.

Reported by *Teo Keang Sood*

---

# Captain Mustapha bin Abdullah v Brigadier-General Abdul Manap bin Ibrahim & Ors

HIGH COURT (SIBU) – ORIGINATING MOTION NO 2 OF 1986
CHONG SIEW FAI J
4 MARCH 1988

*Armed Forces – Absence from settlement training – Court martial – Application for order of prohibition to prohibit court martial from being convened – Merits of case*

*Administrative Law – Court martial – Order of prohibition prohibiting court martial from being convened – Application for – Merits of case*

The applicant was a captain serving in the armed forces and had left for West Malaysia without the necessary approval of the appropriate authority. A court martial was convened to try the applicant. By an originating motion, the applicant applied for an order of prohibition prohibiting a court martial from hearing and trying eleven charges against him. The grounds relied on by the applicant were: (a) that the court martial has no jurisdiction to hear the charges against him since he is no longer subject to armed service law as he was only charged after the prescribed period provided under s 144(3) of the Armed Forces Act 1972 had expired or lapsed; (b) the court martial has no jurisdiction to hear the charges against him since his commanding officer has not investigated the charges; (c) provisions of art 5 of the Federal Constitution and ss 93 and 174(4) of the Armed Forces Act 1972 were not complied with in respect of his arrest. The applicant's further contention as to ground (b) was that only the commanding officer himself could investigate the charge and that he could not delegate such power to another person.

**Held:** (1) From the evidence produced, the applicant was not discharged from the armed forces and as such, he is still subject to armed service law. Ground (a) of the motion thus fails.

(2) Under reg 8(1) of the Armed Forces (Summary Jurisdiction) Regulations 1976, the commanding officer had the authority to delegate the power to investigate charges. However, he could only delegate the power to investigate the four charges but not the other seven charges.

(3) It is settled law that even if the arrest was illegal or not in accordance with law, this in itself would not affect the jurisdiction of the court to try the applicant. Ground (c) is thus devoid of merit.

(4) An order of prohibition shall be issued as regards the first, third, fifth, seventh, ninth, tenth and eleventh charges. In relation to the second, fourth, sixth and eighth charges, the relief sought is refused.

**Cases referred to**

1 *Saw Kim Hai & Anor* v *R* [1956] MLJ 21 (folld)
2 *Saminathan* v *PP* [1937] MLJ 39 (folld)
3 *Dr A Dutt* v *Assunta Hospital* [1981] 1 MLJ 304 (FC) (refd)
4 *R* v *Local Government Board* (1882) 10 QBD 309 (CA) (refd)

**Legislation referred to**

Armed Forces Act 1972 ss 30(1), 93(2), (5), 95, 144(3), 174(4)
Armed Forces (Court Martial) Rules of Procedure 1976 reg 36(1)
Armed Forces (Summary Jurisdiction) Regulations 1976 regs 8(1), 12
Regular Forces (Pensions, Gratuities and Other Benefits) Regulations 1982 reg 20(2)